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# The Negligent Murder

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## THE NEGLIGENT MURDER

For the purposes of this paper, the term *negligent murder* will be used to denote a homicide committed without specific intent to kill or to cause great bodily harm, but a homicide produced by an act or acts which evidence on the part of the accused a wanton and reckless disregard for human life.

In considering the problem of negligent murder, the student of criminal law is confronted first with historical considerations of the bases for criminal liability, and then with subsequent modifications of those beginning principles.<sup>1</sup> Murder early came to be a homicide committed with malice aforethought.<sup>2</sup> Because of the unfortunate choice<sup>3</sup> of this phrase "malice aforethought" to distinguish the offense, it had subsequently to be twisted out of its ordinary and logical sense into a peculiar, technical connotation.<sup>4</sup>

Since, however, murder did come to be distinguished from other felonious homicides by defining it as a killing upon malice, the malice was implied in certain instances.<sup>5</sup> One such instance is found in (b) of Stephen's analysis<sup>6</sup> and to it the purpose of

<sup>1</sup>To quickly summarize this development so far as it is essential to this paper, we may take part of a paragraph from Sayre's *Mens Rea*, 45 Harv. L. Rev. 974, at 1016-17. He says: "Under the dominating influence of the canon law and the penitential books the underlying objective of criminal justice gradually came to be the punishment of evil-doing; as a result the mental factors necessary for criminality were based upon a mind bent on evil-doing in the sense of moral wrong. Our modern objective tends more and more in the direction, not of awarding adequate punishment for moral wrong doing, but of protecting social and public interests."

<sup>2</sup>Stat. Book: 13 Rich. 2, s. 2, c. 1, 4 Hen. 8; Coke, Third Inst. (6th ed. 1680) 47; Com. v. Green, 1 Ashm. (Pa. 1826) 289.

<sup>3</sup>A good discussion relating to this is found in 3 Stephen, Hist. Crim. Law (1883) 55.

<sup>4</sup>Kenney, Outlines of Crim. Law (15th ed. 1936) 153: "A modern student may fairly regard the phrase 'malice aforethought' as now a mere arbitrary symbol. . . . For the 'malice' may have in it nothing really malicious; and need never be really 'aforethought' (except in the sense that every desire must necessarily come before—though perhaps only an instant before—the act which is desired)."

<sup>5</sup>"Homicide is presumed to be murder, unless circumstances are made to appear which extenuate the killing and render it either justifiable or excusable . . ." 38 L.R.A. (N. S.) 1078.

<sup>6</sup>"In reference to murder, 'malice . . . means any one of the following states of mind, preceding or co-existing with the act or omission by which death is caused:

"(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not.

this paper is to give some consideration. There Stephen portrays a state of mind which has been variously termed as "a general malignity of heart",<sup>7</sup> "the heart regardless of social duty and deliberately bent on mischief",<sup>8</sup> "a wicked, depraved, and malignant heart",<sup>9</sup> etc. Present-day courts seem to favor the phrase "depraved mind"<sup>10</sup> as best describing the attitude. They say that although the defendant had no intent to kill, and though there was no express malice, his behavior was such as "evinces a depraved mind" and the court will therefore imply malice<sup>11</sup> and hold him guilty of murder.

Such reasoning is based upon the proposition that malice is a necessary ingredient of murder, and that, since express malice cannot be proved, the law must imply it or the culprit will go unpunished.<sup>12</sup> It is necessarily fallacious because malice in murder is *not required*, the word is a work of art,<sup>13</sup> and the fact that the law 'implies' it in a particular instance signifies merely that under the facts of that case, it considers the conduct of the

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"(b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

"(c) An intent to commit any felony whatever.

"(d) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace, or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such officer so employed . . ." 3 Stephen, *Hist. Crim. Law* (1883) 22.

<sup>7</sup> 1 East, *Pleas of the Crown* (1803) 269.

<sup>8</sup> Foster, *Crown Law* (3d ed. 1809) 262.

<sup>9</sup> Blackstone, *Comm.* (1897) 198.

<sup>10</sup> *Reed v. State*, 225 Ala. 219, 142 So. 441 (1932); *State v. Shepard*, 171 Minn. 414, 214 N. W. 280 (1927); *State v. Trott*, 190 N. C. 674, 130 S. E. 627 (1925); *Ex parte Finney*, 21 Okla. Crim. 103, 205 P. 197, (1922); *Montgomery v. State*, 178 Wis. 461, 190 N. W. 105 (1922).

<sup>11</sup> "Malice in law, or implied malice, was sometimes simply a conclusion from the facts, and liable to be overcome by the proof of other facts, and at other times it was an irresistible legal inference which could not be rebutted." *Darry v. People*, 10 N. Y. (1854) 139.

"Malice . . . in its legal sense means a wrongful act done intentionally, without just cause or excuse." *Bromage v. Prosser*, 4 Barn. & Cress 247 (1825) 255.

<sup>12</sup> 4 Bl. Comm. (1897) 201; *Perkins*, *Malice Aforethought*, 43 Yale L. J. 537 (1934) 550.

<sup>13</sup> *State v. Miller*, 73 S. C. 277, 53 S. E. 426 (1906); *Kenney*, op. cit. supra Note 4, at 134; 3 Stephen, *Hist. Crim. Law* 63; *Wechsler and Michael*, *A Rationale of the Law of Homicide*, 37 Col. L. Rev. 701 (1937) 707; 38 L. R. A. (N. S.) 1092-95.

accused sufficiently blameworthy to merit a conviction of murder.<sup>14</sup>

In determining the degree of blame to be attached to any conduct, the amount and degree of societal harm likely to result is the controlling factor.<sup>15</sup> The requirement of intent to do injury, though at first rendered lip service, was never applied.<sup>16</sup> The practice of inferring<sup>17</sup> and 'implying'<sup>18</sup> intent was a necessary step away from its requirement since the courts found they could not go beyond external manifestations of an accused's thought processes.

There are cases in which the circumstances surrounding the killing are such as would tend to negative any inference of an

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<sup>14</sup> The reader is not to gather from this the idea that it is purely arbitrary with the court whether an individual will be convicted of murder, or a lesser offense. Whether conduct is to be characterized as wanton and "evincing a depraved mind" is usually in the province of the jury because it is considered in view of the surrounding circumstances. Only where the court feels that reasonable men could not differ in interpreting such conduct will the jury be precluded from a chance to pass on it.

In the Report of the New York Law Revision Commission (1937) at 640-41, are tabulated the kinds of acts which New York courts have at various times considered as "evincing a depraved mind". They include: shooting into a highway after dark, striking with a door bar, stabbing, repeated beatings with fists, striking with an axe, throwing an iron pot, shooting into a house where people were, speeding on a street where children were playing, etc.

<sup>15</sup> "Again the dangerousness of the act rather than the killer's intent or state of mind in a specific case was the controlling consideration." Report of the N. Y. Law Rev. Comm. (1937) 539.

<sup>16</sup> Murder at common law embraces cases where no intent to kill existed. 38 L. R. A. (N. S.) 1061, fn. 20. See also *Com. v. Drum*, 58 Pa. 9 (1868) and *infra* notes 17 and 18. Sec. (b) of Stephen's analysis, *supra* note 6, shows that knowledge that an act will probably cause death is enough in murder.

<sup>17</sup> As where intent to kill may be inferred from the use of a deadly instrumentality or the administration of severe wounding in an obviously dangerous manner. An example of the latter is found in the old case, referred to in *Kelyng* 64 (1666), where a mother punished her child by brutally stamping on its belly, thus causing the child's death. She was convicted of murder and executed. See also *Rex v. Grey*, *Kelyng* 64 (1666); *People v. Wolf*, 95 Mich. 625, 55 N. W. 357 (1893); *State v. Douglas*, 28 W. Va. 297 (1886); *State v. Kellison*, 56 W. Va. 690, 47 S. E. 166 (1904).

<sup>18</sup> *Com. v. Webster*, 5 Cush. (Mass. 1850) 295; *Lewis v. State*, 96 Ala. 6, 11 So. 259 (1892); *Stovall v. State*, 106 Ga. 443, 32 S. E. 586 (1899).

"An intent to kill or inflict great bodily harm will be implied as a matter of law, and without inquiry into actual intent, on the principle that a man is presumed to have intended the natural and probable consequences of his voluntary acts." Clark and Marshall, *Law of Crimes* (3rd ed. 1927) 291.

intent on the part of the accused to cause death or serious injury, yet the courts will hold him guilty of murder.<sup>19</sup> Such a result is possible only when a purely objective standard is applied in gauging the actor's conduct. By measuring with an objective yardstick, the courts determine the societal harm likely to result from such conduct. If it were such as commonly entails a high probability of death, the courts conclude that it is so far below the standard which can be reasonably expected of a man of ordinary prudence and good-will that it must not be permitted to continue.

It will be seen that this is going a greater length than Stephen intended to go in his second situation.<sup>20</sup> His standard on its face is subjective and would seem to necessitate a degree of willfulness, or at least a willingness to cause death, which need not actually be present. However, in applying his standard Stephen would very likely have done just as the courts did, by saying that if the conduct involved commonly known danger, the accused would be charged with knowledge of its dangerous tendencies.<sup>21</sup>

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<sup>19</sup> In the case of *Com. v. Chance*, 172 Mass. 245, 54 N. E. 551 (1899), in which the court affirmed a conviction of murder, we find Holmes, C. J., saying: "If it had been necessary, the jury properly might have been instructed that it is possible to commit murder without any actual intent to kill or to do grievous bodily harm, and that, reduced to its lowest terms, 'malice' in murder, means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled perhaps with an implied negation of any excuse or justification." (Here followed the quotation "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct." 1 East, P. C. (1803) 262).

Wechsler and Michael, *op. cit. supra* note 13, at 721 cite the *Chance* case in support of their statement that "awareness of the risk is unnecessary . . . in murder".

In *Com. v. Pierce*, 138 Mass. 165 (1884) 178, Holmes further expresses his belief that the common law applied an external standard in murder: "The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw. To say that he was presumed to have intended them is merely to adopt another fiction, and to disguise the truth. The truth was, that his failure or inability to predict them was immaterial if, under the circumstances known to him, the court or jury, as the case might be, thought them obvious."

<sup>20</sup> He says: "Death caused unintentionally is murder if the unlawful act or omission by which death is caused *is known to the offender* to be eminently dangerous to life . . ." (Italics supplied.) 3 Stephen, *op. cit. supra* note 6.

<sup>21</sup> In *Reg. v. Serne*, Judge Stephen says: ". . . it would be reasonable to say that any act known to be dangerous to life, and likely in

The difficulty of determining how far the courts go in applying the objective standard, disregarding subjective considerations, is very great because those cases in which a subjective standard is applied are either within (a) of Stephen's analysis or they are manslaughter decisions. There are decisions supporting Holmes' view, however, and a close consideration of a few of them becomes pertinent at this time.

In the case of *Wiley v. State*,<sup>22</sup> three officers going to the scene of a robbery became suspicious of the occupants of a car ahead of them and fired at the tires to halt them. The driver's wife was struck by a bullet and killed, and the officer who fired the shot was convicted of murder in the second degree. The court, though saying that "Murder is the unlawful killing of a human being with malice aforethought,"<sup>23</sup> quoted Wharton<sup>24</sup> and Bishop<sup>25</sup> as expressing the rule applicable to this situation. The court concluded that: "The means used by appellants to effect their purpose of stopping the Bates car were of the most violent and threatening kind, so dangerous and lethal in fact, as to cause the death of Mrs. Bates."<sup>26</sup>

A further illustration of the externality of the standard applied by the courts will be found in *Banks v. State*.<sup>27</sup> There

itself to cause death done for the purpose of committing a felony which caused death, should be murder." 16 Cox, C. C. 311 (1887). Since in that case Stephen gave no consideration to whether the accused actually realized the danger to life which his act involved, it would seem to be a perfectly logical conclusion that he would have been equally objective in judging conduct in which no felony was involved, other than the death which it produced.

<sup>22</sup> 19 Ariz. 346, 170 P. 869 (1918).

<sup>23</sup> *Id.* at 873.

<sup>24</sup> "Malice in law does not necessarily mean hate, ill will or malevolence but consists in any unlawful act wilfully done without just excuse or legal occasion to the injury of another person . . . Evil intent is legal malice; so, also, is gross and culpable negligence where by another suffers injury." (Italics supplied.) 1 Crim. Law (11th ed. 1912) sec. 146.

<sup>25</sup> "If an act is unlawful or is such as duty does not demand, and of a tendency directly dangerous to life, the destruction of life by it however unintended, will be murder." 2 Crim. Law (9th ed. 1923) sec. 689.

<sup>26</sup> 19 Ariz. 346, 170 P. 869 (1918), 873.

In the somewhat similar case of *Davis v. State*, 106 Tex. Cr. R. 300, 292 S. W. 220 (1927), an officer fired on a car which failed to halt at his demand. The court affirmed a conviction of murder returned under the charge that "if any person purposely and intentionally fire a pistol at an automobile, knowing at the time that persons are occupants therein, and thereby kill any of such occupants, such offense would be murder, though the person firing had no specific intention to kill."

<sup>27</sup> 85 Tex. Cr. R. 165, 211 S. W. 217 (1919).

the defendant, one of a group of negroes who were walking along a road, fired into a passing freight train, thereby killing a brakeman. Conviction of murder was affirmed, the court observing that "One who deliberately uses a deadly weapon in such reckless manner as to evince a heart regardless of social duty and fatally bent on mischief, as is shown by firing into a moving railroad train upon which human beings necessarily are, cannot shield himself from the consequences of his acts by disclaiming malice."<sup>28</sup>

Then there is a group of cases in which reckless and intoxicated drivers of automobiles were convicted of murder for deaths which they caused.<sup>29</sup> One of the strongest of these is *State v. Trott*,<sup>30</sup> in which the defendant while intoxicated ordered his companion, also intoxicated, to "get on the wheel and get away" in order to avoid arrest. This person thereafter ran the car on one of the main streets of the city, after dark, at a rate of 50 or 60 miles per hour, wrecking another car and killing an occupant thereof. In affirming a conviction of murder in the second degree, the court said: "Malice does not necessarily mean an actual intent to take human life. It may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life."<sup>31</sup>

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<sup>28</sup> In a Note (1937), 25 Ky. L. J. 180, *Banks v. State* is cited as indicative of the tendency of the courts to look to the consequences of the act rather than to the intent which prompted it.

An oft-cited early American case in point is *State v. Smith*, 2 Strob. (S. C. 1847) 77, 47 Am. Dec. 589, in which the defendant was convicted of murder. He had shot at a negro riding along the road, apparently for the sole purpose of causing his horse to become frightened and throw him, but the bullet killed the negro's companion. The court applied a wholly objective standard by saying: "If the act which produced the death be attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, the law from these circumstances will apply malice, without reference to what was passing in the prisoner's mind at the time he committed the act."

<sup>29</sup> *Reed v. State*, 225 Ala. 219, 142 So. 441 (1932); *Hyde v. State*, 230 Ala. 243, 160 So. 237 (1935); *State v. Weltz*, 155 Minn. 143, 193 N. W. 42 (1923); *State v. Shepard*, 171 Minn. 414, 214 N. W. 280 (1927); *State v. Trott*, 190 N. C. 674, 130 S. E. 627 (1925); *Ware v. State*, 47 Okla. Crim. 434, 288 P. 374 (1930); *Cockrell v. State*, — Tex. Cr. R. —, 117 S. W. (2nd) 1105 (1938).

<sup>30</sup> 190 N. C. 674, 130 S. E. 627 (1925).

<sup>31</sup> *Id.* at 629.

The recent case of *Cockrell v. State*, — Tex. Cr. R. —, 117 S. W. (2nd) 1105 (1938) gives full support to the view of this decision. In that case the defendant was driving while drunk at the rate of 60 miles

That the view expressed in these decisions is not necessarily peculiar to modern courts may be gathered from the case of *Rex v. Halloway*.<sup>32</sup> A boy had trespassed into a park to steal wood. The parkkeeper found the boy, beat him, then tied him to a horse's tail, whereupon the horse ran away, dragging the boy and killing him. It was adjudged to be murder, the law implying malice aforethought. In this case, at a time when *mens rea* was considered an essential factor in criminal liability, the court applied an objective standard to the prisoner's conduct and decided that it warranted a conviction of murder.

The case of *Mayes v. People*<sup>33</sup> deserves comment. There the defendant, in an angry and excited state of mind threw a beer mug at his wife. It broke a lamp she was carrying, thereby causing her to be burned to death. He was convicted of murder, the court stating that it was immaterial whether the defendant intended the mug to strike his wife, "or whether he had any specific intent, but acted solely from general malicious recklessness disregarding any and all consequences". Because of such a disregard, evidenced only by his outward conduct, the accused was held guilty of murder.

By way of summary we may say that the law has long punished certain negligent homicides as murder. In so doing, it found the element of malice aforethought missing and resorted to a fiction, namely, "implied malice". Far from being an evil state of mind imposing moral guilt, "implied malice" was a substitute for such a state of mind. Such a fiction, if ever useful, no longer has anything to commend it and it should be discarded. The same may be said of "depraved mind" and "heart regardless of social duty". Unless criminality in murder is wholly subjective, such phrases as applied to negligent murders can but be misleading. The application of an objective standard to defendant's conduct, without regard to what *might* have been the state of his mind at the time, affords the maximum protection to societal interests.

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per hour and killed two pedestrians on the side of the highway. He was found guilty of murder with "malice", the court citing and quoting from *State v. Trott*, *supra*, and quoting also from *Banks v. State*, 85 Tex. Cr. R. 165, 211 S. W. 217 (1919), cited *supra* note 27, that: "The intentional doing of any wrongful act in such manner and under such circumstances as that the death of a human being may result therefrom is malice."

<sup>32</sup> Cro. Car. 131 (1628).

<sup>33</sup> 106 Ill. 306 (1883).



It is submitted that a respectable body of authority is contained in the cases herein referred to, and that such authority sustains the conclusion that the law views objectively the behavior of the individual. Whenever a person's conduct is such that according to common experience there is a strong and obvious likelihood that death will result, if death is thereby caused, it will be murder. This will be true even though the person responsible intended no harm, expected no harm, and in fact was totally unaware of the probability of harm.

For those who would desire to cling to the old canon law concept of criminal punishment only for an evil mind concurring with a socially reprehensible act, we refer them to some of the literature that is being written today to a great degree refuting the idea that capital punishment and long-term prison sentences are meted out for punishment *as such* at all. Books have been written and are being written suggesting that no individual is a criminal in his own right.

In case one thinks this a too radical departure, there is Stephen writing in 1883 saying: "As far as wickedness goes it is difficult to suggest any distinction worth taking between an intention to inflict bodily injury and reckless indifference whether it is inflicted or not."<sup>34</sup> For the purpose of determining that such reckless indifference existed, the law can look only to the outward behavior of the individual.

It is hoped that the objective standard will have a deterring effect in reducing the number of risks to which heedless individuals will subject members of society.<sup>35</sup> In those cases where it does not deter, as in those where threat of punishment does not deter intentional doing of harm, the conduct is blameworthy and a menace to society.<sup>36</sup> It can no more be tolerated and permitted

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<sup>34</sup> 3 Stephen, *op. cit. supra* note 6 at 56.

<sup>35</sup> "Knowledge that punishment may follow behavior that inadvertently creates improper risk, supplies men with an additional motive to take care, before acting, to use their faculties and draw upon their experience in determining the potentialities of their contemplated acts." Wechsler and Michael, *op. cit. supra* note 13 at 751.

<sup>36</sup> "For it is to be remembered that the object of the law is to prevent human life being endangered or taken; and that although it so far considers blameworthiness in punishing as not to hold a man responsible for consequences which no one, or only some exceptional specialist, could have foreseen, still the reason for this limitation is simply to make a rule which is not too hard for the average member of the community. As the purpose is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the

to continue by reason of the purity of purpose of the person responsible than it can be when he is a professed enemy of all mankind.

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law requires them at their peril to know the teachings of common experience. . . ." Holmes, *The Common Law*, (1881) 56-57.